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MAY 26 2004

OFFICE OF PETITIONS

In re Application of
Peter Neilsen
Application No. 10/645,019
Filed: August 21, 2003
Attorney Docket No. N/A

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed May 18, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed;¹ (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

A "Notice of Allowance and Issue Fee Due" was mailed to applicant on January 14, 2004, setting a three-month period within which to submit payment of the issue fee. Since the issue fee was not received by the due date, the application became abandoned on April 15, 2004.

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 151 and 37 CFR 1.137(a).

Applicant states in the instant petition, "Due to travel demands to promote the business, I failed to enter the due date for the issue fee and publication fees in my calendar at the time that I received the Notice of Allowance."

Applicant's preoccupation with other matters, which took precedence over docketing the due date for the issue fee, does not constitute unavoidable delay within the meaning of 37 CFR 1.137(a) and 35 § U.S.C. 151.

Furthermore, applicant has not shown that adequate provisions were made for the careful handling of the Office action in order to ensure a timely reply thereto.

Petitioner is strongly urged to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$665 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

It is noted that applicant makes reference to a second inventor, namely Harold Zenitsky, in the petition. A thorough review of the application file does not show that this application was filed with two inventors. The original oath or declaration submitted upon filing, which established the inventive entity, lists Peter Nielsen as the sole inventor. If it desired for Mr. Zenitsky to be added as a second inventor, a petition under 37 CFR 1.48(a) must be submitted. See MPEP 201.03.

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
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Telephone inquiries concerning this decision should be directed to the undersigned at (703) 306-3475.

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